92-736 (1)

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No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

HIRAM H. HOELZER,

Petitioner,

v.

THE CITY OF STAMFORD, CONNECTICUT.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED

Should this Court use its supervisory power under Rule 10.1(a) in view of the Circuit Court's departure from the accepted and usual course of judicial proceedings and from due process of law in that:

A. The Circuit Court modified a decision even though finding it error-free and based on substantial evidence;

B. The Circuit Court ignored and misstated evidence in order to reach its decision;

C. The Circuit Court disregarded the law of the case fixed by another panel of the same court on a prior appeal without any later change of circumstances; and

D. The Circuit Court relieved the respondent City of Stamford, Connecticut, from paying properly assessed damages when the record shows that it knew the amount claimed and chose to have the issue tried?

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OPINIONS AND PROCEEDINGS BELOW

In this bifurcated trial on the separate issues of title to a mural and the value of the plaintiff's services in restoring it, the opinions and decisions below were as follows (A 1-82):[1]

1. On October 16, 1989, the District Court held that the respondent City of Stamford had title (A 38; 722 F.Supp. 1106, S.D. N.Y. [Stanton, J.]).

2. On Jan. 3, 1990, the District Court certified an intermediate appeal (A 73).

3. On May 28, 1991, the Circuit Court affirmed and allowed the petitioner to seek compensation for his services (A 8 & 24; 933 F.2d 1131 [Kaufman, Kearse & Newman, JJ.'s]).

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1. The following abbreviations will be used: A = Appendix hereto; JA = Joint Appendix on appeal; TR = Trial Transcript; the City = the respondent.

4. On July 12, 1991, the Circuit Court denied a rehearing or en banc review of its original decision (A 77).

5. On Jan. 29, 1992, after a non-jury trial, the District Court fixed the value of those services at $557,200 (A 28; ___ F.Supp. ____ [Stanton, J.])

6. On August 13, 1992, the Circuit Court affirmed the District Court in full but permitted Stamford to return the mural in lieu of paying the petitioner (A 8; 972 F.2d 495 [Lumbard, Van Graafeiland & Kearse, JJ.'s]).

7. On September 29, 1992, the Circuit Court denied a rehearing or en banc review of the second decision (A 79).

8. On October 7, 1992, the Circuit Court issued its mandate (A 81).

JURISDICTION TO REVIEW

Review is sought of the Circuit Court's decision of August 13, 1992 (A 1), of the denial of rehearing and en banc review of September 29, 1992 (A 79), and of the mandate thereon of October 7, 1992 (A 81), pursuant to 28 U.S.C. § 1254(1) and Rule 10.1(a) of this Court, which states:

> "Jurisdiction on Writ of Certiorari [exists] When a United States court of appeals has...so far departed from the accepted and usual course of judicial proceedings ...as to call for an exercise of this Court's power of supervision."

Jurisdiction below was based on diversity of citizenship, namely, the petitioner was a citizen of New York and had the mural there, while the City was a citizen of Connecticut.

THE FACTS

This is an action by an art restorer seeking a declaratory judgment that he owned a mural or, if not, awarding him the value of his services in restoring it (JA 9). The City denied his ownership but admitted that he was entitled "to the reasonable market value of his restoration and/or preservation services" (JA 15).

The trial as to title was on stipulated facts which, as summarized from the District Court's first decision, included the following:

The petitioner is a noted art restorer with particular expertise in restoring large murals painted under the Works Progress Adminstration in the 1930s. During a renovation of the Stamford High School in 1970, a mural about 8 feet high and 110 feet long was ripped from the

walls of the City's High School, placed in a dumpster, recovered by a student, turned over to the General Services Administration, delivered by the G.S.A.'s supervisor of W.P.A. works to the petitioner in 1971 with no contract or instructions, and restored by him over the next 16 years (A 38-72).

In 1980 and thereafter, officials of the City viewed the mural in his studio at various times, claimed title to it only in 1986, and even then did not ask him to stop the restoration (id.).

As the District Court later found, the petitioner did this "in the good faith belief that the murals were property which had been abandoned to him and that he owned them" (A 31).

Notwithstanding its finding that "The City can be faulted for leaving a valuable piece of art in storage for so long" (A

65), the District Court held that "The City owns the mural" (A 66). This was affirmed by the Circuit Court on an intermediate appeal, which held that the petitioner "may, if he seeks to, pursue whatever claim exists for equitable compensation" (A 24).

The District Court, after detailed testimony by the petitioner's three experts (JA 60-87 and TR 186-244), which was not refuted by the City's three experts (JA 88-96 and TR 80-186, 244-251, 309-356), fixed that compensation at $557,200 (A 33 & 37). The chronolgy between the bifurcated trials is critical:

1. The method of reaching that amount was set forth in the record in the petitioner's "Answer to Interrogatory A-1" propounded by the City, which was served upon the City on November 19, 1989 and was detailed in his chart thereof whose column

D totaled precisely thet $557,200 awarded in 1992.[2]

2. This directly contradicts the Circuit Court's findings on the second appeal that the City "could have had no idea that the cost of restoring the mural would come to $557,200" and did not learn this until "the 1992 trial" (A 6). The

2. JA 128, 134 & 135, Exhs. 34 & 35:

A	B	C	D
Year	Restora. Charge/Day All Workers	No. of Restora. Days Worked	Restora. Charge For Year (BxC)
1971	$ 600	16	$ 9,600
1974	800	13	10,400
1977	1,200	13	15,600
1980	1,600	26	41,600
1986	1,600	200	320,000
1987	1,600	100	160,000

The petitioner notes the provision in this Court's Rule 15.1 that "**Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later.**" (emphasis by the Court). The City cannot deny that it received the chart in November of 1989, for it was served in anticipation of the conference for scheduling the second trial set by Judge Stanton's first decision (A 72) and, outside the record, it was filed in the Court on November 27, 1989 (Docket # 29) and was included in the papers which were discussed with Judge Stanton on the adjourned conference date of November 30, 1989.

record contained other evidence that the City knew of this claimed amount well before the trial, as follows:

a. The plaintiff's 1989 chart and his $557,200 claim were specifically ratified in the pre-trial affidavits of the petitioner and his three experts filed as their direct testimony and served upon the City in 1991 (JA 52, 65, 79 & 86).

b. The amount was repeated in the 1991 "Consent Pre-Trial Order" signed by counsel for both Parties (JA 26).

3. Before the trial of that monetary claim, Judge Stanton certified an intermediate appeal on the issue of title, stating, inter alia:

> "If the district court's decision is affirmed, any further appeal may be unlikely since it would address only the calculation of compensation" (A 74).

4. In its brief on the first appeal, the City concluded its argument that it

had title by stating: "There is no 'windfall' to the City, as the City has admitted that plaintiff is entitled to compensation for his services in restoring the mural." (Brief on appeal, p. 18) -- a fact later stressed in the petitioner's brief on the second appeal (Brief, p. 10).

5. Judge Kaufman's conclusion that the petitioner could proceed to seek compensation for his restoration services (A 24) reflected his reliance on the City's brief in the following colloquy:[3]

> Judge Kaufman: "Mr. Wise, if Stamford has title to the mural, why will Mr. Hoelzer not be adequately compensated by payment for his restoration services?"
>
> Mr. Wise: "Your Honor, Stamford may well refuse to pay for such services or be unable to do so."
>
> Judge Kaufman: "That is not a likelihood."

3. There is no transcript of this, but it was quoted thus in the petitioner's brief on the second appeal and was not questioned by the City's attorney or by Judge Kearse, who sat on both panels.

6. After Judge Stanton made his award, Stamford appealed, and the brief filed by the petitioner included the following, which is contrary to the Circuit Court's decision (Brief, p. 21, emphasis added):

> "[T]he amount of $557,200 was no surprise to Stamford, as shown by the following. After the first trial but before the prior appeal, Stamford served interrogatories upon Mr. Hoelzer and, in November of 1989, he replied and submitted his charted calculation of that amount (JA 134 & Exh. 35, supra p. 3)".

That statement specifically called to the Circuit Court's attention the petitioner's 1989 claim totalling $557,200, as well as the references thereto in the record, i.e. the chart set forth on page 7, supra. These directly contradict the Court's later finding that the City could have had no knowledge of the petitioner's $557,200 claim until the 1992 trial (A-6).

Notwithstanding, the Court then nomi-

nally affirmed Judge Stanton's decision but, with no request by the City, gave the City the option of returning the mural without paying the petitioner (A 7).[4]

That was a bargain in 1992, for the City's own appraiser testified that the "current [art] market, which has changed from 1987" is "uncertain and bad... Prices are down substantially" (TR 126-7).

Nevertheless, after the $557,200 was awarded, the City took possession of the mural, still has it (A 24), and never even suggested that it be relieved from paying for the petitioner's restoration.[5]

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4. In a letter to the counsel for the petitioner, the City promptly so elected outside the record.

5. A signed but unfiled stipulation proposed and drafted by the City (set forth at A 83) provided that the City "will maintain in its self-insurance account at least $650,000 unencumbered and available to satisfy the judgment" and that the purpose of this was that the City "would rather pay to the Plaintiff the non-refundable appeal bond premium to reduce the obligation for storage and partial restoration that the defendant acknowledges it owes to the Plaintiff even if the defendant is successful on appeal and there is a remand for new trial".

POINT I

THE CIRCUIT COURT DEPARTED SO FAR FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THIS COURT'S SUPERVISION AND REVERSAL.

Although holding that "Judge Stanton's award of $557,200 is supported by substantial evidence" and contained "no error" (A 6), and although acknowledging the rule that "An appellate court will set aside such an exercise of discretion only if it is arbitrary" (id.), the Circuit Court went on to find that "Nevertheless Stamford could have had no idea that the cost of restoring the mural could come to as much as $557,200" and learned of this only "at the 1992 trial" (id.).

Based on that statement alone, the Court then modified the District Court's award of compensation by allowing the City to "satisfy the judgment by abandoning its ownership of the murals and returning them

to Hoelzer" (A 7).

Not only is this an unprecedented departure from the rule of finality of error-free judgments which are based on substantial evidence supporting a reasonable amount, but the underlying premise of the City's ignorance of its risk was palpably incorrect. After a brief discussion of this Court's Rule 10.1(a), both of these errors, and others, are shown in detail below (pp. 15-26).

This Court's supervisory power

Commenting on Rule 10.1(a), Moore's Federal Practice states (¶ 810.27):

> "This is an old and well established provision that directly relates only to the federal courts of appeals, and goes back to the Revised Rules of 1925 that promptly followed the Judiciary Act of that year.
>
> "It is an appropriate provision. The Supreme Court stands at the apex of the federal judicial system...

> "Rule 10 recognizes an additional responsibility -- to ensure that the courts of appeals stay within the boundaries of 'the accepted and usual course of judicial proceedings'".

That Rule (then numbered 19 and later numbered 17) has been applied to the Court of Appeals for the Second Circuit (New York City Transit Authority v. Beazer, 440 U.S. 568, [1979]). There, the Court of Appeals had strayed from required practice when it "affirmed [the District Court] without reaching the statutory question" in issue (p. 571). Quoting the Rule (id.), this Court found that to be a "departure from the procedure normally followed...[which] led us to grant certiorari" and then to reverse (id.).

In the present case, the following four instances of the Circuit Court's active departure from normal procedure go far beyond the passive one in Beazer.

A. The Circuit Court modified a decision even though finding it to be error-free and based on substantial evidence

The Circuit Court created an option for the City to escape paying the compensation awarded even though finding that the District Court's award contained "no error" and had been based on "substantial evidence" (A 6-7). Even before reaching the inherent breach of the principle of the "law of the case" discussed below (pp. 21-25), this departure violated basic practice:

> "Because of the deference due to the trial judge, unless an appellate court is left with the 'definite and firm conviction that a mistake has been committed', it must accept the trial court's findings." (Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855 [1982]); accord, Southern Ry. Co. v. Blue Ridge Power Co. (30 F.2d 33, 40 [4th Cir. 1929], cert. den. 279 U.S. 860).

Here, with the case having been left by Judge Kaufman's panel on the first

appeal to the District Court to determine "equitable compensation" (A 24), the Circuit Court on the second appeal acknowledged that "equitable remedy rests in the sound discretion of the district court" (A 6) and expanded with the following lip-service to this Court (id.):

> "See Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (plurality opinion) ('In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.'"

Continuing, the Court then conceded: "An appellate court will set aside such an exercise of discretion only if it is arbitrary" (id., emphasis added).

But in the end, the Court disregarded all of this by modifying Judge Stanton's decision without finding anything arbitrary there. The Court cited no supporting statute, no rule, no holding, and only one barely tangential case of its own, thus:

"See Alden Auto Parts Warehouse, Inc. v. Dolphin Equip. Leasing Corp. 682 F.2d 330, 333 (2d Cir. 1983)." (A 7).

There, the District Court had "found that both parties had been negligent" (id., p. 332). The Circuit Court found that "each was in error as to a different fact" (id.). The Court then discussed the rule that relief from "a unilateral mistake ...will normally not be granted if the defendant, by changed circumstances or otherwise, will be prejudiced" (id., p. 333). The Court then explained that "There is no dispute that in the present case there has been a change of circumstances" (id.). Nevertheless, the Court affirmed, explaining (id., p. 334):

> The appellant "Alden's reliance on the principle that a claimant's carelessness in executing an agreement does not bar recovery is misplaced. Such negligence may not be a defense to a right to recovery if such a right is prima facie established." (emphasis added).

Here, there were no such changed circumstances; the City did not claim any or show any unilateral mistake; nor did the Circuit Court; and none existed. Rather, going far beyond the "prima facie" proof mentioned by the Alden case as barring such a defense, the petitioner's right to compensation was established by the first decisions of the District and Circuit Courts (A 28 and 24).

Thus, the Court disdained the basic finality of judgments which are error-free and supported solidly by evidence. Beyond that, the Court closed its eyes to the record, as is shown next.

B. The Circuit Court ignored and misstated evidence in order to reach its decision.

The controlling premise of the Circuit Court's decision is that the City "could have had no idea" of the amount of the petitioner's $557,200 claim until it

was made "at the 1992 trial" (A 6).

The invalidity of such an excuse from paying damages is discussed below (pp. 25-26). However, assuming, arguendo, that it is valid, the factual inaccuracy of the Circuit Court's statement is clear from the record as made known to the Court.

The petitioner's chart of his days spent on the restoration and his charges therefor (supra, p. 6, fn. 2) was given such emphasis that it appears in the record twice: first, as the last page of the petitioner's "Answer to Interrogatory A-1" (Exh. 34 at JA 128 & 134); second, on a separate page (Exh. 35 at JA 135).

The City's full awareness that the petitioner's claim was $557,200 is further shown by the following excerpts from the facts already set forth:

1. The City received the charted calculation in November of 1989, when it

was filed and discussed with Judge Stanton (supra, p. 7, fn. 2).

2. The City was reminded of that amount forcefully by the various pre-trial evidentiary affidavits in 1991 (supra, p. 8: JA 52, 65, 79 & 86).

3. The City itself acknowledged its awareness of that amount as the claim by signing the "Consent Pre-Trial Order" in 1991 (supra, p. 8: JA 35 & 26).

The Circuit Court was put on notice of this advance knowledge by the City in two ways.

First, the caption on Exhibit 34 -- "Answer to Interrogatory A-1" -- necessarily shows pre-trial disclosure of what is intended to be put to "Use At Trial" (F.R. Civ. P. 33(b)).

Second, the petitioner's main brief unequivocally informed the Court that "the amount of $557,200 was no surprise to

Stamford" since it had been detailed in his aforesaid chart answering the City's interrogatories and sent to the City "in November of 1989" (supra, p. 10).

Reduced to its essence, the issue focused on by the Circuit Court was "What did the City know of the amount in issue, and when did it know it?" The Court was blind to the record's pivotal evidence that the City was told of the extent of the restoration services and their cost early and often. That evidence effectively wiped out even the Court's premise for its unprecedented decision discussed in the preceding section.

C. The Circuit court disregarded the law of the case fixed by another panel of the same court on a prior appeal without any later change of circumstances.

In its decision on the itermediate appeal affirming the City's title to the mural, Judge Kaufman's panel set the "law

of the case" by permitting the petitioner to seek "compensation" in the District Court (A 24). The Circuit Court's second decision, for which certiorari is sought, reversed that by allowing the City to "satisfy the judgment by abandoning its ownership of the murals and returning them to Hoelzer" (A 6-7).

In doing this, the second panel did not even suggest any intervening change of circumstances to justify disregarding the doctrine of the law of the case.

That doctrine "expresses the practice of courts generally to refuse to reopen what has been decided" (Messinger v. Anderson, 225 U.S. 436, 444 [1912]; quoted in Central Soya Co. v. Geo A. Hormel & Co., 723 F.2d 1573, 1580 [Fed. Cir., 1983]). In Central Soya, where the case had been bifurcated between liability and damages, the Court declined to review the

damages decision, explaining:

> "[T]he law of the case doctrine...generally adheres to a decision in a prior appeal in the case unless one of three 'exceptional circumstances' exists: 'the evidence on a subsequent appeal was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice" (id.; quoted approvingly in Kori Corp. v. Wilco Marsh Baggies & Draglines, Inc., 761 F.2d 649 [Fed. Cir. 1985], cert. den. 474 U.S. 902). -- Stated alternatively:
>
> "True, the doctrine of the law of the case is a rule of practice and not a limitation of power, yet it will not, except for very cogent reasons, be departed from." (Western Fire Ins. Co. v. University City, 124 F.2d 698, 699 [1942]).

The absence of any such "exceptional circumstances" here is implicit in the Circuit Court's finding of "no error".

The reversal of the law of the case set by Judge Kaufman's opinion obliterated

the numerous underlying facts, e.g. Judge Stanton's certification of the intermediate appeal on the presumption that "any further appeal may be unlikely since it would address only the calculation of compensation" (A 73); the City's assurance to Judge Kaufman's panel that the petitioner "is entitled to compensation for his services" (see supra, p. 8); Judge Kaufman's statement at the argument of the appeal that it was "not a likelihood" that Stamford would not pay the compensation (see supra, p. 8); the authorization in Judge Kaufman's opinion to the petitioner to seek "compensation" (A 24); and Judge Stanton's reliance on and quotation of that authorization in his decision after the second trial (A 33).

Not once, never, did the City ask the Court to relieve it from its assurances that it would pay the compensation. Even

the outstanding stipulation in lieu of appeal bond "acknowledges" the City's obligation to pay the petitioner (see supra, p. 11). Nor, in view of its admissions and briefed argument to the Court on the first appeal (see supra, pp. 4 & 8) could the City have withdrawn its promises to pay the compensation, for:

> "The rule is well established that during the course of litigation a party is not permitted to assume or occupy inconsistent and contradictory positions" (31 C.J.S., Estoppel, § 117(b & a); Davis v. Wakelee, 156 U.S 680,689 [1894], cited approvingly in Roth v. McAllister Bros, Inc., 316 F.2d 143, 145 [2d Cir. 1963]).

The Circuit Court flouted the law of this case set on the first appeal.

D. The Circuit Court relieved the City from paying properly assessed compensation when it knew the amount claimed and chose to have the issue tried.

If the discussion above (pp. 17-19) had not disproven the Circuit Court's

finding that the City "could have had no idea" of the amount of the petitioner's claim, the answer would be that trial judgments generally surprise at least one of the litigants. Only settlement agreed to before judgment removes the element of surprise to at least one of the litigants.

Damages properly awarded in proper amounts may not be set aside because a judgment-debtor subjectively underestimated them. Otherwise damages will routinely be subject to unrestrained reversal on appeal. That will undermine the finality of decisions so stressed by this Court.

In conclusion to Point I, it is submitted that each of the Circuit Court's departures "from the accepted and usual course of judicial proceedings" (Rule 10.1(a)) was extraordinary, and that their cumulative effect calls for this Court's supervision and eventual reversal.

POINT II

THE FOUR DEPARTURES FROM ACCEPTED PRACTICE BY THE CIRCUIT COURT SHOWN IN POINT I DENIED THE PETITIONER DUE PROCESS OF LAW AND THREATEN UNLIMITED ABUSE OF POWER BY COURTS IF PERMITTED.

Until the Circuit Court made the four departures from the usual course of judicial proceedings shown in Point I, the petitioner had a clear property right, namely, the right to compensation for his restoration services. That right had been admitted in the record in the City's answer to the complaint (JA 15), in Judge Stanton's certification of the intermediate appeal (A 73), in the City's brief on the first appeal (see supra, p. 8), and in Judge Kaufman's authorization to the petitioner to seek compensation for his restoration services (A 24).

In New York City Transit Authority v. Beazer (supra, at p. 11: 440 U.S. 568), this Court granted certiorari and reversed

under its supervisory powers because of the respondent's omission in failing to reach the statutory question in issue. Here, the same Circuit Court's departures from accepted practice were even harsher in that they consisted of the active commissions detailed in Point I.

Not only did the Circuit Court find nothing arbitrary in Judge Stanton's decision, but the Circuit Court's decision itself was arbitrary in those four departures from normal practice.

It is fundamental that, under the Fifth Amendment's limitation on the taking of property, "Arbitrary action is not due process" (Rudder v. United States, 226 F.2d 51, 53 [D.C. Cir. 1955]; Burnett v. Central Nebraska Public Power & Irr. District. 125 F.2d 836, 838 [8th Cir. 1942]; Bello v. Walker, 840 F.2d 1124, 1129 [3rd Cir. 1988], cert. den. 488 U.S.

851).

This Court has stated the principle more broadly (Marshall v. Jericho, Inc., 446 U.S. 234, 242 [1980], citing Mathews v. Eldridge, 424 U.S. 319, 334 [1976]):

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal... [and] safeguards...the prevention of unjustified or mistaken deprivations... The neutrality requirement helps to guarantee that...property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done'".

The Circuit Court's decision constituted just such a "deprivation...on the basis of an erroneous or distorted conception of the facts" and "the law", in the conjunctive rather than the alternative. The errors and distortions shown in Point I portray an exercise of

unauthorized, unprecedented, and unlimited power by the Circuit Court.

That power, if unchecked, goes far beyond its effect upon this petitioner. It goes beyond the system of checks and balances built into our Constitution. If a Circuit Court can disregard accepted practice and escape review because of the difficulty in obtaining certiorari, all of the legal safeguards in our jurisprudence are at risk.

This Court's role in protecting those safeguards has been explained as follows (Supreme Court Practice, Stern, Gressman & Shapiro, 6th ed., 1986, pp. 222-3, citations omitted):

> "It is enough that four or more Justices are so doubtful of the correctness of the decision below that they desire further consideration of the case. They may be motivated by a feeling that the decision represents a gross miscarriage of justice, or a subtle erosion of a statutory or legal principle, or that the

> result reached below is unduly harsh in its impact. Or they may believe that proper supervision of the federal judiciary demands that the lower court be set aright. The Court may reasonably believe that correction of an erroneous decision...reflects the Court's error-correction function in exercising its supervisory power over the federal judicial system referred to in Rule 17.1(a)"

That Rule, now Rule 10.1(a) combines with the requirement of due process to call for certiorari and reversal here.

POINT III

THE CIRCUIT COURT'S DECISION WAS GROSSLY INEQUITABLE.

As just quoted, certiorari may be granted when "the result reached is unduly harsh in its impact".

The four departures from normal practice already discussed (Points I and II) were unduly harsh in allowing the City to avoid compensating the petitioner by "abandoning" the mural back to him. While

that appears, on its face, to put him back in the position he was in when he asserted title, the facts are strongly to the contrary for three reasons.

First, paralleling the City's successful blocking of the petitioner's claim of title since 1987, the art market has deteriorated drastically, as shown by the following testimony by Stamford's appraiser at the trial in 1992 (TR 126-7):

> "The current status of today's art market is... uncertain and bad...Prices are down substantially...My suspicion is that in this current market, which has changed from 1987, it would be very difficult to find any buyer at any price ...this year".

Returning the mural now to the petitioner at its greatly reduced value will harm him greatly while freeing the City from its repeated promises to compensate him.

Second, the City's rejection of the petitioner's title has made him bear the

heavy expenses of this litigation.

Third, even in stipulating to hold $650,000 aside to pay the judgment in lieu of an appeal bond the City "acknowledges" that it owes compensation to the petitioner (A 84).

In fine, the Circuit Court has chosen to disregard the City's pleading that it would pay the petitioner for his restoration services (A 15), the City's repetition of that to Judge Kaufman's panel (Brief, p. 18), and the City's choice to go to trial with full knowledge of its exposure (see supra, p. 7-8). This allows the City to wash its hands of the entire matter after having inflicted great hardship on the petitioner.

That is not the "equity" for which the judicial requirement is "clean hands". It is not what the petitioner deserves for his sixteen years of art restoration done,

as Judge Stanton found, "in the good faith belief that the murals were property which had been abandoned to him and that he owned them" (A 31). It is not the "equitable compensation" which Judge Kaufman's court held that he deserved (A 24).

CONCLUSION

Certiorari should be granted.

THE PETITIONER

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 1992, three copies of the foregoing were mailed, postage prepaid, to James V. Minor, Esq., City of Stamford Law Department, P.O. Box 10152, Stamford, CT 06904-2152.

Stephen A. Wise

Stephen A. Wise, Attorney